Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

XIU FENG LI, as Administrator of the Goods, Chattels and Credits of MENG GUI LI, Deceased, and for the benefit of the distributees,

Petitioner,

– v. –

DOUGLAS HOCK and SMP INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit incorrectly applied the "interest of justice" test in 28 U.S.C. § 1404(a), the venue transfer statue based on "the convenience of parties and witnesses," rather than the "interest of justice" tests in either 28 U.S.C. §§ 1406 or 1631, the transfer statutes based on "the wrong . . . district" and "want of jurisdiction," respectively, thereby letting plaintiff's by-then time barred action be dismissed outright for want of personal jurisdiction rather than transferred to the proper district.

2. Whether the "want of jurisdiction" referenced in 28 U.S. § 1631, which triggers transfer "if it is in the interest of justice," is limited to want of subject matter jurisdiction only, or encompasses want of personal jurisdiction as well.

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Xiu Feng Li, administrator for the decedent Meng Qui Li respectfully petitions for a writ of certiorari to review the judgments of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Second Circuit denying petitioner's appeal is available at U.S. App. LEXIS 6489 and reproduced at App. To Pet. Cert. __. The decision of the U.S. Court of Appeals for the Second Circuit denying petitioner's petition for a rehearing of that order is not officially reported but is reproduced at App. To Pet. Cert. __. The decision of the U.S. District Court for the Eastern District of New York dismissing petitioner's case for lack of personal jurisdiction is not officially reported but is available at 2009 U.S. Dist. LEXIS 6809 and reproduced at App. To Pet. Cert. __. The decision of the U.S. District Court for the Eastern District of New York denying petitioner's motion to vacate that order is not officially reported but is reproduced at App. To Pet. Cert. __.

JURISDICTION

The judgment of the Second Circuit affirming the District Court was issued on March 30, 2010. App. To Pet. Cert. __. Petitioner's petition for a rehearing and rehearing *en banc* was denied by an Order dated June 16, 2010. App. To Pet. Cert. __. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1404(a) provides:

> Change of venue
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1406(a) provides:

> Cure or waiver of defects
>
> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1631 provides:

> Transfer to cure want of jurisdiction
>
> Whenever a civil action is filed in a court as defined in section 610 of this title [28 USCS § 610] or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or

> noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

STATEMENT OF FACTS

Petitioner's husband, the decedent Ziu Feng Li, was a passenger in a vehicle traveling from New York to Pennsylvania on January 9, 2007 when it was struck in the rear by respondent's truck while in Pennsylvania. App. To Pet. Cert. __.

Following the appointment of an administrator, petitioner commenced this wrongful death action in the New York State Supreme Court, Kings County, with eleven months remaining on Pennsylvania's two year statute of limitations. Respondent removed the case to the Eastern District of New York, and the District Court dismissed the case for lack of personal jurisdiction on January 30, 2009, three weeks after Pennsylvania's statute of limitations expired, making it impossible for petitioner to commence an action in Pennsylvania. App. To Pet. Cert. __.

Petitioner moved the District Court, pursuant to Federal Rules of Civil Procedure §§ 60(b)(1) and 60(b)(6), to vacate the order of dismissal or, in the alternative, to transfer the case to the Eastern District of Pennsylvania. The District Court denied the motion and declined to transfer the case. App. To Pet. Cert. __.

Petitioner appealed to the Second Circuit both on the merits of the District Court's decision not finding person jurisdiction over respondent, and, citing 28 U.S.C. § 1406, on the District Court's refusal to

transfer the case. The Second Circuit affirmed the District Court's decision on the question of whether the District Court had personal jurisdiction over respondent, and, relying on 28 U.S.C. § 1404 rather than 28 U.S.C. § 1406, refused to transfer the case to Pennsylvania, quoting *Ayers v. Arabian American Oil Co.*, 571 F.Supp. 707, 709 (S.D.N.Y. 1983) for the proposition that, "[a]bsent a clear and convincing showing that the balance of convenience strongly favors the alternate forum . . . discretionary transfers are not favored." App. To Pet. Cert. __.

REASONS FOR GRANTING THE WRIT

The Second Circuit clearly erred in rooting its transfer analysis in 28 U.S.C. § 1404, which concerns transfer requests made for the convenience of a party, rather than in 28 U.S.C. § 1406, which concerns transfer of "a case laying venue in the wrong division or district," or in 28 U.S.C. § 1631, which concerns transfer of a case for "want of jurisdiction."

While each of these transfer statutes employs an "interest of justice" test, the error in applying the wrong statute is not academic. As the purpose of each statute is different, so is each statute's "interest of justice" test different. It is most difficult to satisfy under § 1404, the "convenience of a party" statute, which the Second Circuit employed, and arguably least difficult to satisfy under § 1631, "want of jurisdiction" statute; but there is a split among the lower courts as to whether § 1631 even applies to cases with a want of *personal* jurisdiction, or whether it is limited to cases with a want of *subject matter* jurisdiction. Regardless, had the Second

Circuit correctly employed § 1406, the "venue in the wrong division or district" statute, petitioner would certainly have satisfied its "interest of justice" test.

I.

THE SECOND CIRCUIT APPLIED THE WRONG TRANSFER STATUTE AND LEFT DECEDENT'S WIDOW WITHOUT THE OPPORTUNITY TO HAVE HER DAY IN COURT

The Court analyzed the transfer issue under 28 U.S.C. § 1404 (transfer for convenience of the parties), under which transfer is generally disfavored, but should have analyzed the issue under 28 U.S.C. § 1406 (transfer to cure defect) or 28 U.S.C. § 163 1 (transfer due to lack of jurisdiction), under which transfer is generally favored.

The "interest of justice" analysis under the statutes is different because they apply to different factual circumstances and implicate different policy considerations. Transfers under § 1404 require a more burdensome showing because the analysis presupposes that the forum court is proper and the reason for transfer is merely the convenience of the moving party. In contrast, the interest of justice analysis under §§ 1406 and 1631 is substantially less burdensome because it presupposes that the forum is improper and the reason for the transfer is to permit the case to be resolved on the merits in a proper forum.

The difference between the interest of justice analysis under the different transfer statutes is well-illustrated by *Avers v. Arabian American Oil Co.*, 571

F. Supp. 707 (S.D.N.Y. 1983), which is quoted in the Second Circuit's decision for the proposition that transfers are "not favored" and require a "clear and convincing showing that the balance of convenience strongly favors the alternate forum." The Ayers court, however, was referring to transfers for the convenience of the parties, not transfers necessary to prevent a plaintiff losing their day in court.

By contrast, transfer sought pursuant to §§ 1406 and 1631 in order to preserve the ability of plaintiffs to maintain their case are highly favored over the alternative, dismissal. *See e.g. Burnett v. New York C. R. Co.*, 380 U.S. 424, 430, 85 S. Ct. 1050, 1056, n.7 (1965) ("Numerous cases hold that when dismissal of an action for improper venue would terminate rights without a hearing on the merits because plaintiff's action would be barred by a statute of limitations, 'the interest of justice' requires that the cause be transferred."); *Corke v. Sameiet M. S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (transfer is "clearly warranted" where a case lacking personal jurisdiction would be time-barred if not transferred, since "alleviating the burden of this type of procedural obstacle was an important purpose behind § 1406(a)."); *Bolar v. Frank*, 938 F.2d 377, 380 (2d Cir. 1991) (Circuit Court of Appeals transferred case directly, even where the issue was not raised before the District Court, "because [plaintiff] might be time barred from initiating a new action in this matter, 'the interest of justice' merits such a transfer."); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1545 (10th Cir. 1996) (Where district court had choice between dismissal or transfer, where dismissal meant plaintiff was time

barred from bringing case in proper jurisdiction, "The interest of justice resoundingly mandated a transfer in this case."); *Cox Enterprises, Inc. v. Holt*, 691 F.2d 989 (11th Cir. 1982) (where the choice confronted is between dismissal and a potential time bar to re-filing and transfer, "The interests of justice strongly preponderate in favor of transfer of this case."); *Bashaw v. Belz Hotel Management Co.*, 872 F Supp. 323 (W.Va 1995) (personal injury suit brought by West Virginia citizens against Florida hotel transferred to Florida under 28 USCS § 1406, rather than dismissed outright, where venue is improper in West Virginia due to lack of personal jurisdiction over hotel); *Nation v. United States Gov't*, 512 F. Supp. 121, 126-127 (S.D. Ohio 1981) ("transfer in and of itself is generally considered to be more in the 'interest of justice' than dismissal and, therefore, doubts should be resolved in favor of preserving the action, particularly where it appears that venue may be properly laid in the proposed transferee district."); 15 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 3827 at 268 (2d ed. 1986) ("in most cases of improper venue . . . courts conclude that it is in the interest of justice to transfer to a proper forum rather than to dismiss. The reasons for doing this are especially compelling if the statute of limitations has run, so that dismissal would prevent a new suit by plaintiff.").

Although a split exists in the lower courts on whether 28 U.S.C. § 1631 applies to cases wanting in personal jurisdiction (*see infra*), § 1631's "interest of justice" analysis is similar to § 1406's. *See e.g.*, *Tex. Peanut Farmers v. United States*, 409 F.3d 1370, 1375 (Fed. Cir. 2005) (transfer ordered where, "It is

conceivable that, absent transfer, applicable statutes of limitations may bar appellants from adjudicating otherwise legitimate claims."); *Scherbatskoy v. Halliburton Co.*, 125 F.3d 288, 292 (5th Cir. Tex. 1997) ("Here, a balancing of equities weighs in favor of transfer because a new appeal by the Scherbatskoys at this point would be barred as untimely and we find nothing to indicate that the Scherbatskoys acted in bad faith by filing the instant appeal."); *Phillips v. Seiter*, 173 F.3d 609, 610 (7th Cir. Ill. 1999) ("A compelling reason for transfer is that the plaintiff, whose case if transferred is for statute of limitations purposes deemed by section 1631 to have been filed in the transferor court . . . will be time-barred if his case is dismissed and thus has to be filed anew in the right court."); *ITT Base Servs. v. Hickson*, 155 F.3d 1272, 1276 (11th Cir. 1998) (transfer, rather than dismissal, ordered where case brought "to the appropriate district court would probably be time-barred if we were to dismiss this case.").

The Second Circuit's application of 28 U.S.C. § 1404 rather than 28 U.S.C. §§ 1406 or 1631 was clear error, and prevented petitioner's claim from being decided on the merits. It is respectfully submitted that this Court should reverse the Second Circuit's decision in this case and clarify that the proper venue transfer section to be applied in cases where the transfer is being sought not merely for the convenience of a party, but to allow a case to be decided on the merits rather than face a time bar, is §§ 1406 or 1631. *See* John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 975

(Summer 1998) ("[T]here is considerable confusion about the overlapping applicability of sections 1404, 1406, and 1631 to cases in which the defendant has some basis for objecting to the plaintiff's choice of forum on a ground other than, or in addition to, improper venue.").

II.

THE COURT SHOULD RESOLVE THE SPLIT AMONG LOWER COURTS CONCERNING THE APPLICATION OF 28 U.S.C. § 1631 WHERE THERE IS A WANT OF PERSONAL – AND NOT MERELY SUBJECT MATTER – JURISDICTION

There is a split of authority among various lower courts as to whether 28 U.S.C. § 1631 covers cases having a want of personal jurisdiction, as opposed to a want of merely subject matter jurisdiction:

> We note that there is a debate over whether 28 U.S.C. § 1631 provides for transfers only where a federal court lacks subject matter jurisdiction, or whether it also applies where other types of jurisdiction are lacking, including personal jurisdiction. *Compare Roman v. Ashcroft*, 340 F.3d 314, 328 (6th Cir. 2003) (concluding that "§ 1631 . . . applies to federal courts identifying any jurisdictional defect, regardless of whether it involves personal or subject matter jurisdiction."), and *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 284 (3d Cir. 1994) (indicating that where personal jurisdiction is lacking, a court may consider a transfer pursuant to § 1631), and *Ross v. Colo. Outward Bound Sch., Inc.*, 822 F.2d 1524, 1526-27 (10th Cir. 1987) (same), with *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d

172, 179 n.9 (2d Cir. 2000) (noting that "the legislative history of section 1631 provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction"), and *Pedzewick v. Foe*, 963 F. Supp. 48, 50 (D. Mass. 1997) ("agreeing with the line of cases limiting section 1631 to transfer for lack of subject matter jurisdiction only"), and 15 Charles Alan Wright et al., *Federal Practice and Procedure* § 3842 (2d ed. 1986) ("[Section 1631] is concerned only with subject matter jurisdiction. It has nothing to do with personal jurisdiction or venue."). Those that construe § 1631 narrowly do so in reliance on the statute's legislative history, *see, e.g.*, *Pedzewick*, 963 F. Supp. at 50 (noting that a Senate report issued when Congress enacted § 1631, S. Rep. No. 97-275, at 11 (1987), reprinted in 1982 U.S.C.C.A.N. 11, 21, 40, states in part that the statute "would authorize the court in which a case is improperly filed to transfer it to a court where subject matter jurisdiction is proper"), while those that read the statute expansively generally rely on its language and Congress' intent in passing it, *see, e.g.*, *Roman*, 340 F.3d at 328 (observing that "the language of § 1631 does not refer to any specific type of jurisdiction, only referring broadly to jurisdiction" and that "a broad construction of the statute is consistent with Congress's intent to protect a plaintiff against either additional expense or the expiration of a relevant statute of limitations in the event that the plaintiff makes an error in trying to select the proper court within the complex federal court system" (internal

> quotation marks omitted)). Although we are inclined to read § 1631 as allowing for transfers where a federal court lacks any type of jurisdiction (including personal jurisdiction), we need not definitely decide the issue today . . .

Cimon v. Gaffney, 401 F.3d 1, 7 n.21 (1st Cir. 2005). *Also compare Nose v. Rementer*, 610 F. Supp. 191, 193 (D. Del. 1985) ("Although it is phrased in a manner which could be interpreted as meaning it is to apply to cases like this one, in which the transferor court lacks personal jurisdiction over the defendants, section 1631 appears from its legislative history to apply only to cases in which the transferor court lacks subject matter jurisdiction."), and *Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 51 (N.D.N.Y 1988), *affd.* 871 F.2d 9 (2d Cir. 1989) ("Even though that statute can be interpreted to apply to cases such as the present one where personal jurisdiction is lacking in the transferee court, the legislative history does not support such an interpretation. The legislative history makes clear that that statute was only intended to apply to cases in which the transferror court lacks subject matter jurisdiction."), and *McTyre v. Broward General Medical Center*, 749 F. Supp. 102, 105 (D.N.J. 1990) ("[S]ince this case involves lack of personal jurisdiction, section 1631 is inapplicable and we thus apply section 1404(a)."), with *Lawman Armor Corp. v. Simon*, 319 F. Supp. 2d 499, 507 (E.D.Pa. 2004) ("The Court concludes it does not have personal jurisdiction over defendant. In the interest of justice, this case is transferred to the U.S. District Court for the Eastern District of Michigan pursuant to 28 U.S.C. § 1631."), and *Arriaga v Imperial Palace*, 252 F Supp 2d 380 (S.D. Tex. 2003)

(case transferred pursuant to 28 U.S.C. § 1631 where court lacked personal jurisdiction over defendant).[1]

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[1] *See also Carpenter-Lenski v. Ramsey*, 2000 U.S. App. LEXIS 4138, 4-6 (7th Cir. 2000):

> There is some debate over whether § 1631 applies to cases like this where personal jurisdiction is lacking. Several courts, particularly the Tenth Circuit, have held that § 1631 applies in cases where either subject matter jurisdiction or personal jurisdiction is lacking. *See, e.g., Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 793 (10th Cir. 1998); *Ross v. Colorado Outward Bound Sch., Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987); *Gray v. Lewis & Clark Expeditions, Inc.*, 12 F. Supp. 2d 993, 998 (D. Neb. 1998); *Med-Tec, Inc. v. Kostich*, 980 F. Supp. 1315, 1331 (N.D. Iowa 1997); *Exton v. Our Farm, Inc.*, 943 F. Supp. 432, 441 (D. N.J. 1996); *O'Neal v. Hatfield*, 921 F. Supp. 574, 576 (S.D. Ind. 1996); *United States v. American River Transp., Inc.*, 150 F.R.D. 587, 591-92 (C.D. Ill. 1993); *Composite Marine Propellers, Inc. v. Vanderwoude*, 741 F. Supp. 873, 878-79 (D. Kan 1990); see also 16 *MOORE'S FEDERAL PRACTICE*, 108.143[2] (Matthew Bender 3d ed.) ("the language of [§ 1631] is certainly broad enough to permit its application in cases in which personal jurisdiction is lacking . . ."). Other courts, however, relying on the legislative history, hold that § 1631 applies only to cure defects of subject matter jurisdiction. *See, e.g., Pedzewick v. Foe*, 963 F. Supp. 48, 50 (D.Mass. 1997); *Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 51-52 (N.D. N.Y. 1988); *Nose v. Rementer*, 610 F. Supp. 191, 192 n.1 (D. Del. 1985); see also 15 Wright, Miller, & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3842 ("[§ 1631] is concerned only with subject matter jurisdiction. It has nothing to do with personal jurisdiction or venue."). We have not addressed this issue, and need not reach it in this case, because the application of § 1631 would not alter the outcome.

It is respectfully submitted that the Court should resolve the split among the lower courts as to the scope of 28 U.S.C. § 1631, i.e., whether it covers both personal and subject matter "want of jurisdiction."

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 14, 2010

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

XIU FENG LI,

Plaintiff,

-against-

DOUGLAS HOCK and SMP INC.,

Defendants.

OPINION & ORDER
08 CV 02068 (SJF)
(VVP)

FEUERSTEIN, J.

On or about February 1, 2008, Plaintiff Xiu Feng Li ("Plaintiff") commenced this action against defendants Douglas Hock ("Hock") and SMP Inc. ("SMP") (collectively "Defendants") in the Supreme Court of the State of New York, County of Kings. Defendants removed this action to this Court pursuant to 28 U.S.C. §§ 1332 and 1441. Before the Court is the motion of Defendants to dismiss the Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) ("Rule 12(b)(2)"). For the reasons set forth herein, Defendants' motion is granted.

I. Background

Plaintiff, a resident of New York, was employed by New Yung Wah Carrier, LLC ("NYWC"), a "New York based company." (See Pl's Counter-Statement of Material Facts, filed Jan. 22, 2009 ("Pl's Counter-Statement"), p.3.) NYWC "was in the business of selling and delivering food to restaurants." (See id.)

Hock, a resident of Pennsylvania, is employed by SMP, a Pennsylvania corporation with its principle [*sic*] place of business in New Jersey. (Defs.' Statement of Facts, filed Jan. 22, 2009 (Defs.' Statement of Facts"), at. p.l.) SMP "is in the trucking business, transporting goods primarily between New Jersey and Pennsylvania." (SMP Aff., filed Jan. 22, 2009, at ¶ 2.) SMP is not licensed to transact business in the State of New York. (See id.)

On January 9, 2007, Hock was operating a 2006 Freight Line Tractor, which was owned by SMP. Hock was on route from South Carolina to New Jersey to deliver a load of lumber. (See Hock Aff., filed Jan. 22, 2009, ¶ 3.) At approximately 8:20 p.m., Hock was traveling eastbound on Interstate 78 in Pennsylvania when his vehicle collided with a 2004 Mitsubishi Refrigerator Truck owned by NYWC and operated by Bing Hong Chen ("Chen"). At the time of the collision, Chen and Plaintiff, employees of NYWC, were on route from New York to Pennsylvania to "deliver[ ] food to restaurants." (Pl's Counter-Statement p.3.) Chen was injured and Plaintiff died as a result of the collision.

II. Discussion

A. Legal Standard

In order to determine whether there is a basis to exercise personal jurisdiction over a defendant, a district court is required to apply a two (2) part analysis. See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999); see also D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 104 (2d Cir. 2006) (holding that in diversity cases, the issue of personal jurisdiction is governed by the laws of the forum state, so long as

the exercise of jurisdiction comports with the requirements of due process). First, a court will look to the law of the forum state, here New York, to determine whether there is jurisdiction over the defendant. See Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 29 (2d Cir. 1996). Second, a court "must determine whether an exercise of jurisdiction under these laws is consistent with federal due process requirements." Bank Brussels Lambert, 171 F.3d at 784.

Although the plaintiff must ultimately establish personal jurisdiction over the defendant by a preponderance of the evidence, see Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990); Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984), in opposing a Rule 12(b)(2) motion prior to discovery, "the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant. . . . Where a court [has chosen] not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials." Grand River Enter. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 165 (2d Cir. 2005), cert. denied sub nom King v. Grand River Enter. Six Nations, Ltd., 549 U.S. 951, 127 S.Ct. 379, 166 L.Ed.2d 267 (2006) (quoting Bank Brussels, 171 F.3d at 784) (citations and internal quotation marks omitted). In order to make a prima facie showing of jurisdiction, the plaintiff need only plead "legally sufficient allegations of jurisdiction." Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998); see also Dorfman v. Marriott Int'l Hotels, Inc., No. 99 Civ. 10496, 2002 WL 14363, at * 1 (S.D.N.Y. Jan. 3, 2002) (holding that when a motion to dismiss

pursuant to Rule 12(b)(2) is brought on the pleadings, before any discovery has taken place, the plaintiff need only make a prima facie showing that personal jurisdiction exists, based on allegations of fact which will be taken as true).

"Unlike a motion to dismiss pursuant to Rule 12(b)(6), deciding a Rule 12(b)(2) motion necessarily requires resolution of factual matters outside the pleadings." ADP Investor Commc'n Servs, Inc. v. In House Attorney Servs, Inc., 390 F. Supp. 2d 212, 217 (E.D.N.Y. 2005). "Where the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor." Wickers Sportswear, Inc. v. Gentry Mills, Inc., 411 F. Supp. 2d 202, 205-06 (E.D.N.Y. 2006) (quoting Whitaker v. American Telecasting, Inc., 261 F.3d 196, 208 (2d Cir. 2001); see also In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003) (holding that a plaintiff's averments of jurisdictional facts must be credited as true); ADP Investor, 390 F. Supp. 2d at 217 (holding that where no jurisdictional discovery has been conducted, the plaintiff need only establish a prima facie case, and allegations of jurisdictional fact must be construed in a light most favorable to the plaintiff).

B. Jurisdiction under New York Law.

The Parties do not dispute that this Court lacks jurisdiction over Defendants under New York's long arm statute, N.Y. C.P.L.R. § 302.[1] Plaintiff, however, alleges that this Court has jurisdiction over SMP pursuant to N.Y. C.P.L.R. § 301 ("§ 301").

Pursuant to § 301, an out-of-state defendant is subject to general personal jurisdiction[2] if it is "doing business" in the state. See Wiwa, 226 F.3d at 95. Section 301 "permits a court to exercise jurisdiction over a foreign corporation on any cause of action if the defendant is 'engaged in such a continuous and systematic course of "doing business" here as to

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[1] Section 302 provides, in relevant part, that "a court may exercise personal jurisdiction over any non domiciliary, or his executor or administrator, who in person or through an agent:" (1) "transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act;" or (3) "commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (1) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or 4 owns, uses or possesses any real property situated within the state." N.Y. C.P.L.R. § 302 (a).

[2] "General" jurisdiction, exists where, as here, the plaintiff's claim is not related to the defendant's contacts in New York. See, e.g. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 98 (2d Cir. 2000) (stating that where the plaintiffs' claims is not related to the defendants' contacts with New York, jurisdiction is properly characterized as "general.")

warrant a finding of its "presence" in this jurisdiction.'" Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039, 1043 (2d Cir. 1990) (quoting McGowan v. Smith, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 419 N.E.2d 321 (1981)). "A corporation is 'doing business' and is therefore 'present' in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York 'not occasionally or casually, but with a fair measure of permanence and continuity.'" Wiwa, 226 F.3d at 95 (quoting Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985)).

In order to establish general personal jurisdiction under § 301, a plaintiff must demonstrate that the defendant engaged in "continuous, permanent, and substantial activity in New York." Landoil Res. Corp., 918 F.2d at 1043. "The test is a 'simple pragmatic one' . . ., which is necessarily fact sensitive because each case is dependent upon its own particular circumstances." Id. (citations omitted). Factors to be considered in determining whether general jurisdiction lies under § 301 include: (1) whether the defendant maintains an office in New York; (2) whether the defendant has any bank accounts or other property within the state; (3) whether the defendant has a telephone listing in the state; (4) whether the defendant does public relations work or solicits business within the state; and (5) whether the defendant has employees or agents located within the state. See Wiwa, 226 F.3d at 98; Landoil Res. Corp., 918 F.2d at 1043.

"However, the [s]olicitation of business alone will not justify a finding of corporate presence in New York with respect to a foreign manufacturer or purveyor of services." Landoil Res. Corp., 918 F.2d at 1043 (citations and quotation marks omitted). Nonetheless, "if the solicitation is substantial and continuous, and defendant engages in other activities of substance in the state, then personal jurisdiction may properly be found to exist." Id. at 1043-44 (citations omitted). "Under this solicitation-plus rule, once solicitation is found in any substantial degree very little more is necessary to a conclusion of doing business." Id. at 1044 (citation and quotation marks omitted).

Plaintiff contends, *inter alia*, that: (1) Hock, on behalf of SMP, "made 20 to 50 deliveries of materials to companies within New York State within one year and a half of the accident;" (2) "presumably other driver working for [SMP]" also made deliveries into New York; and (3) SMP maintains a "website which advertise[s] that [SMP] conduct[s] a trucking business in all 48 contiguous States of the United States and in all Canadian Providences also." (Pl.'s Counter-Statement p.5.)

However, even viewing SMP's contacts with the State of New York in the light most favorable to Plaintiff, Plaintiff has not made a prima facie showing that SMP had a substantial 'physical corporate presence' in [New York], permanently dedicated to promoting [its] interests," Wiwa, 226 F.3d at 98, sufficient to confer general personal jurisdiction over SMP. There is no evidence indicating that SMP maintains an office in New York, has bank accounts or other property in New York, has a New York telephone listing, performs

public relations work in New York, or has any employees permanently located in New York. In addition, there is no evidence indicating that SMP "substantial[ly] or continuous[ly]" solicits business in the State of New York or that SMP engages "in other activities of substance in the state." Landoil Res. Corp., 918 F.2d at 1043. Plaintiff's conclusory assertions and presumptions to the contrary, are insufficient to establish general personal jurisdiction over SMP pursuant to § 301. See, e.g., Jazini, 148 F.3d at 185 (holding that courts are not bound to accept as true a legal conclusion couched as a factual allegation).

The delivery of goods into the State of New York in this case is insufficient to confer it jurisdiction under § 301. See Beacon Enter, Inc. v. Menzies, 715 F.2d 757, 763 (2d Cir. 1983) (stating "[t]he shipment of goods into New York does not ipso facto constitute 'doing business.'") (citations omitted); see also New World Capital Corp. v. Poole Truck Line, Inc., 612 F. Supp. 166, 171 (S.D.N.Y. 1985) (finding that the plaintiff's "hauling of freight into, out of and through New York does not suffice to warrant a finding that [the plaintiff] is present and doing business in this state"). Defendants "transport goods primarily to and from New Jersey to Pennsylvania." (Forgarty [*sic*] Aff., filed Jan. 22, 2009, ¶ 4.) Hock stated that, within one year and a half of the accident, he has made "a couple of deliveries in the State of New York." (Hock Dep. 10:21-22, dated Apr. 1, 2008, attached as Ex. C to Pl.'s Counter-Statement.) Hock also stated, *inter alia*, that he made two (2) deliveries to Long Island, New York and that he never delivered or picked up in Queens, Staten Island or Brooklyn, New York. (See Id. at 11:12-12:7.)

In addition, SMP's maintenance of a website that advertises that it conducts business in the United States is insufficient to confer jurisdiction under § 301. See Sound Around Inc. v. Audiobahn, Inc., 07 Civ. 773, 2008 WL 5093599, at *6 (E.D.N.Y. Nov. 24, 2008) (stating that "[w]hen solicitation involves a website, the fact that a foreign corporation has a website accessible to New York is insufficient to confer jurisdiction under C.P.L.R. § 301," however, "[a] interactive website may support the proposition that the defendant is doing business in the state.") (citations and quotation marks omitted).

This Court also lacks jurisdiction over Hock. Hock, *inter alia*, is not domiciled in New York and the incident giving rise to this action occurred in Pennsylvania. Although Plaintiff alleges that Hock was an independent contractor, the record indicates that Hock was an employee of SMP. See United Mizrahi Bank Ltd. v. Sullivan, No. 97 Civ. 9282, 2000 WL 1678040, at *3 (S.D.N.Y. Nov. 6, 2000) ("[A]n officer of the corporation does not subject himself [ ] individually to 301 jurisdiction unless he is doing business in [New York] individually.") (citation omitted). Plaintiff fails to allege sufficient facts indicating that Hock was doing business in New York. There is no evidence indicating that Hock maintains an office in New York, has bank accounts or other property in New York, has a New York telephone listing, performs public relations work in New York, or solicits business in New York. Under these circumstances, the record does not support the exercise of jurisdiction over Hock. See Agua Products, Inc. v. Smartpool, Inc., No. 04 Civ. 5492, 2005 WL 1994013, at *5 (S.D.N.Y. Aug. 18, 2005).

C. Due Process

Even assuming, *arguendo*, that Plaintiff made a prima facie showing of general personal jurisdiction under § 301, Plaintiff has failed to show that the exercise of jurisdiction in this case comports with constitutional due process requirements.

In order to satisfy constitutional due process requirements, the exercise of long-arm jurisdiction "must be based on defendants' 'minimum contacts' with the state and must comport with 'traditional notions of fair play and substantial justice.'" Agency Rent A Car, 98 F.3d at 32 (quoting International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945)); see also Wiwa, 226 F.3d at 99 (accord). Where specific jurisdiction is found, minimum contacts exist "where the defendant purposefully availed itself of the privilege of doing business in the forum and could forsee being haled into court there," but where general jurisdiction is found, minimum contacts exist only where the contacts "are continuous and systematic." Bank Brussels, 305 F.3d at 127 (citations and internal quotations marks omitted). Generally, "once a plaintiff has made a 'threshold showing' of minimum contacts, the defendant must come forward with a 'compelling case that the presence of some other considerations would render jurisdiction reasonable." Wiwa, 226 F.3d at 99 (citing Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996)).

Here, the cause of action does not arise out of Defendants' contacts with New York. Even viewing all the contacts that Plaintiff alleges that Defendants

have with the State of New York in the light most favorable to Plaintiff, including, *inter alia*, Defendants' delivery of goods into the State of New York and SMP's maintenance of its website, Defendants' contacts with the State of New York are insufficient to establish "continuous and systematic" contacts to satisfy the constitutional due process requirements. Bank Brussels, 305 F.3d at 127; see also C.B.C. Wood Products, Inc. v. LMD Integrated Logistics Services. Inc., 455 F. Supp. 2d 218, 223-24 (E.D.N.Y. 2006).

Accordingly, the Defendants' motion to dismiss the action for lack of jurisdiction pursuant to Rule 12(b)(2) is granted.

III. Conclusion

For the reasons stated herein, the motion of Defendants to dismiss this action for lack of personal jurisdiction is GRANTED. The Clerk of Court is directed to close this case.

SO ORDERED.

/s/ Sandra J. Feuerstein
Sandra J. Feuerstein
United States District Judge

Dated: January 29, 2009
Central Islip, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

XIU FENG LI,

Plaintiff,

-against-

DOUGLAS HOCK and SMP INC.,

Defendants.

OPINION & ORDER
08 CV 02068 (SJF) (VVP)

FEUERSTEIN, J.

I. Introduction

On or about February 1, 2008, Plaintiff Xiu Feng Li ("Plaintiff") commenced this action against defendants Douglas Hock ("Hock") and SMP Inc. ("SMP") (collectively "Defendants") in the Supreme Court of the State of New York, County of Kings. Defendants removed this action to this Court pursuant to 28 U.S.C. §§ 1332 and 1441 by Order dated January 29, 2009 ("January 2009 Order"), this Court granted the motion of Defendants to dismiss the Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) ("Rule 12(b)(2)"). On February 26, 2009, Plaintiff filed an appeal ("Appeal") of the January 2009 Order to the United States Court of Appeals for the Second Circuit. Before the Court is Plaintiff's unopposed motion seeking, *inter alia*, to vacate the January 2009 Order pursuant to Rule 60(b)(1) and Rule 60(b)(6) of the Federal Rules of Civil Procedure ("Rule 60(b)") and to transfer this case to the United

States District Court for the Eastern District of Pennsylvania. For the reasons set forth herein, Plaintiff's motion is denied.

II. Discussion

A Effect of Appeal

Although, generally, the timely filing of a notice of appeal divests a district court of jurisdiction over those aspects of the case involved in the appeal, a court retains jurisdiction to deny a Rule 60(b) motion during the pendency of an appeal. See King v. First Am. Investigations, Inc., 287 F.3d 91, 94 (2d Cir. 2002). 'This Circuit allows a district court either to 'entertain and deny the rule 60(b) motion' without the circuit court's permission, or 'grant a rule 60(b) motion after an appeal is taken . . . if the moving party obtains permission from the circuit court.'" Id. (quoting Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992); see also Selletti v. Carey, 173 F.3d 104, 109 (2d Cir. 1999) (citation omitted). There is no indication that Plaintiff sought permission from the Second Circuit for this Court to entertain the instant motion. Nonetheless, the Court retains jurisdiction over the instant motion as the motion is denied for the reasons stated below.

B. Rule 60(b)

Rule 60(b) provides. in pertinent part, that:

> the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation, or other misconduct by an opposing party; (4) the judgment is void; (5) the

> judgment has been satisfied. released, or discharged . . . ; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The Rule requires that the motion "must be made within a reasonable time - - and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1).

Rule 60(b) "preserves a balance between serving the ends of justice and ensuring that litigation reaches an end within a finite period of time." House v. Sec'y of Health & Human Servs., 688 F.2d 7, 9 (2d Cir. 1982). Although Rule 60(b) "should be broadly construed to do 'substantial justice,' . . . final judgments should not be lightly reopened." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986) (citation omitted). "Motions under Rule 60(b) are addressed to the sound discretion of the district court and are generally wanted only upon a showing of exceptional circumstances." Mendell v. Gollust, 909 F.2d 724, 731 (2d Cir. 1990) (citing Nemaizer, 793 F.2d at 61); see United States v. Bank of New York, 14 F.3d 756, 759 (2d Cir. 1994) (relief under Rule 60(b) may be granted only in "extraordinary circumstances"). Rule 60(b) "may not be used as a substitute for timely appeal." Id. (citations omitted).

Plaintiff alleges that the January 2009 Order should be vacated based upon a "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Contrary to Plaintiff's assertion, this Court did not "inadvertently overlook[ ] both [D]efendant[s'] and [P]laintiff's request to transfer this case.'" (Sobiloff Affirm., filed Apr. 27, 2009 ("Sobiloff Affirm."), ¶ 32.) While Plaintiff is correct

that Defendants indicated at a conference held before me on January 21, 2009 that they were making a motion to transfer the case, Defendants instead moved to dismiss the action based upon lack of jurisdiction pursuant to Rule 12(b)(2). (See Defs.' Notice of Mot., filed Jan. 22, 2009, p.1; Defs.' Mem. of Law in Supp of Mot. to Dismiss, filed Jan. 22, 2009, p.4.) Insofar as Defendants' reply to Plaintiff's opposition requested that the Court dismiss the case or "at least transfer [ ] the case," (Defs.' Reply Affirm., filed Jan. 22, 2009, ¶ 2; Defs.' Reply Mem. of Law, filed Jan. 22, 2009, p. 3), such request for relief was not overlooked since the Court granted Defendants' motion to dismiss for lack of jurisdiction. Indeed, Plaintiff's opposition papers state that "[D]efendant[s] here [are] merely seeking to dismiss the case." (Affirm. in Opp'n, filed Jan. 22, 2009 ("Pl.'s Opp'n, filed Jan. 22, 2009 ("Pl.'s Opp'n"), p.13.)

In addition, the Court did not overlook Plaintiff's request to transfer this case. Plaintiff's opposition did not state a basis for transfer, stating only in a point heading and in its "wherefore" clause that "if the Court decides to grant [ ] Defendants' motion, that the Plaintiff respectfully requests that the Court transfer this action to the United States Court, Eastern District of Pennsylvania." (Pl.'s Opp'n" p.13.) While the Court has discretion to transfer a case based upon its lack of personal jurisdiction if such transfer is "in the interests of justice," 28 U.S.C. § 1406(a), Plaintiff did not raise this argument. Rather, Plaintiff argued, *inter alia*, that: (1) this Court has jurisdiction over Defendants; (2) "[P]laintiff's choice of forum is entitled to substantial deference;" (3) "[t]here is no practical reason why this case should be transferred; and (4) "[P]laintiff would have no objection to issuing a voluntary

discontinuance [as to defendant Hock] without prejudice if need be, in order to preserve the jurisdictional integrity of the New York forum." (Pl.'s Opp'n pp. 6-12.) In addition, while this Court also has discretion to transfer a case "upon motion, consent or stipulation of all parties," 28 U.S.C. § 1406(b) ("§ 1406(b)"), the parties did not make a motion pursuant to § 1406(b), consent or stipulate. Contrary to Plaintiff's assertion, Defendants' request that the Court "at least transfer[ ] the case" does not rise to consent.

Plaintiff further alleges that the January 2009 Order should be vacated: (1) in the interest of justice; (2) to prevent extreme and undue hardship; and (3) for extraordinary circumstances. See Fed. R. Civ. P. 60(b)(6). Specifically, Plaintiff argues that "[P]laintiff is no longer able to commence a new action in Pennsylvania because the statute of limitations has run." (Sobiloff Affirm ¶ 44.) While the Court is sympathetic, Plaintiff's failure to raise these arguments in its opposition to Defendants' motion based upon facts that were available to Plaintiff at that time do not rise to the level of "exceptional circumstances" to warrant the extraordinary relief pursuant to Rule 60(b)(6). See Westport Ins. Corp. v. Goldberger & Dubin, P.C., 255 F. App'x. 593, 595, 2007 WL 4201386, 2 (2d Cir. 2007) (stating that "[n]ew arguments based on hindsight regarding how a movant would have preferred to have argued its case do not provide grounds for Rule 60(b) relief") (citing Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir. 1986)).

Accordingly, Plaintiff's motion is denied.

III. Conclusion

For the reasons stated herein, the motion of Plaintiffs to vacate is DENIED.

SO ORDERED.

/s/ Sandra J. Feuerstein
Sandra J. Feuerstein
United States District Judge

Dated: April 28, 2009
Central Islip, New York

09-0844 cv
Xiu Feng Li v. Douglas Hock and SMP Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION 'SUMMARY ORDER'). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of March, two thousand and ten.

Present: RALPH K. WINTER,
JOHN M. WALKER,
ROSEMARY S. POOLER,
Circuit Judges.

Xiu Feng Li,

Plaintiff-Appellant,

-v-

09-0844-cv(L),
09-2038-cv(con)

Douglas Hock and
SMP, Inc.

Defendants-Appellees.

Appearing for Appellant: David L Sobiloff, Morelli Ratner, PC, New York, NY

Appearing for Appellees: Edward Fogerty, Jr., Litchfield Cavo LLP, New York, NY

Appeal from the United States District Court for the Eastern District of New York (Feuerstein, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Meng Qui Li ("Li"), a resident of New York and now deceased, was employed by New Yung Wah Carrier, LLC ("NYWC"), a food delivery company based in New York. Douglas Hock ("Hock") is a Pennsylvania resident who was employed by SMP, Inc. ("SMP"), a Pennsylvania corporation, with its principal place of business in Phillipsburg, New Jersey. On January 9, 2007, Hock drove from South Carolina to New Jersey to make a delivery of some lumber. Hock's truck collided with a vehicle owned by NYWC in which Li was a passenger. Li died as a consequence of the collision.

Xiu Feng Li brought this action as decedent to her husband, Li, in the Supreme Court of the State of New York, County of Kings. Defendants removed this case to the United States District Court for the Eastern District of New York. On January 30, 2009, the district court entered an order granting defendants' motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Plaintiff subsequently brought a motion under Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6) to vacate the dismissal and to transfer the case to the United States District Court for the Eastern District of Pennsylvania. The district court entered an order denying the Rule 60(b) motion and declining to transfer the case. Plaintiff now appeals both orders. We assume the parties' familiarity with the underlying facts, the procedural background, and the specification of the issues on appeal.

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2) for a lack of personal jurisdiction, a plaintiff carries the burden of demonstrating that jurisdiction exists. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994). Where a court, as here, has not "conduct[ed] a full-blown evidentiary hearing on a motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials." Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981). A plaintiff need only plead "legally sufficient allegations of jurisdiction." Jazini v. Nissan Corp., 148 F.3d 181, 184 (2d Cir. 1998). We review a district court's dismissal of an action for lack of personal jurisdiction de novo. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996).

In order to resolve a motion to dismiss for lack of personal jurisdiction, a district court must first "determine whether there is jurisdiction over the defendant under the relevant forum state's laws." Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999). Next, the court asks "whether an exercise of jurisdiction . . . is consistent with federal due process requirements." Id.

Plaintiff argues that the district court had personal jurisdiction over defendants under N.Y. C.P.L.R. § 301 ("Section 301"), which permits a court to exercise personal jurisdiction over a foreign defendant that is "doing business" in New York. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000).

"[A] corporation is 'doing business' and is therefore 'present' in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York not occasionally or casually, but with a fair measure of permanence and continuity." Id. (internal citation and quotation marks omitted). See Landoil Res. Corp. v. Alexander & Alexander Serv. Inc., 918 F.2d 1039 (2d Cir. 1990).

New York courts have focused on several factors to support a finding that a defendant was "doing business," including "the existence of an office in New York; the solicitation of business in New York; the presence of bank accounts or other property in New York; and the presence of employees or agents in New York." Landoil, 918 F.2d 1039 at 1043. Additionally, "[s]olicitation of business alone will not justify a finding of corporate presence in New York

with respect to a foreign manufacturer or purveyor of services." Laufer v. Ostrow, 55 N.Y.2d 305, 310 (1982). If the solicitation is "substantial and continuous," however, "and defendant engages in other activities of substance in the state, then personal jurisdiction may properly be found to exist." Landoil, 918 F.2d at 1043 (citing Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 763 (2d Cir. 1983)).

Plaintiff alleged several facts relevant to whether SMP was "doing business" in New York at the time of the accident. Wiwa, 336 F.3d at 95. First, she argued that Hock, during his employment as [*sic*] SMP, "made 20-50 deliveries of materials to companies within New York State within one year and a half of the accident." She further alleged that therefore, "presumably other drivers working for [SMP] also made deliveries into New York." Finally, she alleged that SMP's website states that SMP operates "a trucking business in all 48 contiguous States of the United States and in all Canadian Provinces."

The district court correctly concluded that taken together, and in the light most favorable to the plaintiff, these facts do not demonstrate that SMP was "doing business" in New York under Section 301. As the district court observed, "[t]here is no evidence indicating that SMP maintains an office in New York, has bank accounts or other property in New York, has a New York telephone listing, performs public relations work in New York, or has any employees located in New York." Nearly all of the central factors relevant to the determination of whether a defendant is "doing business" in New York therefore weigh against a finding of personal jurisdiction. The fact that SMP transported goods

into New York is also not dispositive. See Beacon Enter. Inc., v. Menzies, 715 F.2d 757, 763 (2d Cir. 1983.).

SMP's solicitation of business in New York raises a somewhat closer question. While SMP advertises on its website that it "conduct[s] a trucking business in all 48 contiguous" states, this statement does not rise to the level of a "substantial and continuous" solicitation that would support the exercise of personal jurisdiction. Landoil, 918 F.2d at 1043.

Assuming, arguendo, that plaintiff could show that the district court had jurisdiction under Section 301, she could not show that the exercise of jurisdiction would be consistent with federal due process requirements. Wiwa, 226 F.3d at 99. To satisfy the requirements of due process, a plaintiff must first show first that defendant has "minimum contacts" with the forum state. See Metropolitan Life Ins. Co., 84 F.3d at 568. Second, the plaintiff must demonstrate that the exercise of jurisdiction comports with "'traditional notions of fair play and substantial justice.'" Id. SMP's occasional solicitations in and shipments to New York were too infrequent and too insignificant to give rise to an expectation that SMP would be subject to jurisdiction there, and they therefore do not constitute minimum contacts. Bank Brussels, 305 F.3d at 127.

Plaintiff also argues that the district court erred in failing to conduct jurisdictional discovery. We do not agree. We review a district court's decision to decline to conduct jurisdictional discovery for abuse of discretion. First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 175 (2d Cir. 1998). To find that a district court abused its discretion in

declining to conduct discovery on a motion to dismiss for a lack of personal jurisdiction, we must conclude that a plaintiff established a prima facie case that jurisdiction exists. Best Van Lines Inc. v. Walker, 490 F.3d 239, 255 (2d Cir. 2007). Since we conclude that there was no prima facie case for jurisdiction, we also find that the district court did not err in declining to engage in jurisdictional discovery.

We also do not accept plaintiff's argument that the case should have been transferred to the Eastern District of Pennsylvania. On a motion to transfer under section 28 U.S.C. § 1404(a) or 1404(b), the burden is on the movant to show that the transfer is justified. Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 521 (2d Cir. 1989). "Absent a clear and convincing showing that the balance of convenience strongly favors the alternate forum . . . discretionary transfers are not favored." Ayers v. Arabian American Oil Co., 571 F. Supp. 707, 709 (S.D.N.Y. 1983) (internal citation and quotation marks omitted)). We find that plaintiff has not met her burden to show that the matter should have been transferred.

Finally, plaintiff argues that her motion to vacate the judgment under Federal Rule of Civil Procedure 60(b) should have been granted. "Motions under Rule 60(b) are addressed to the sound discretion of the district court and are generally granted only upon a showing of exceptional circumstances." Mendell ex rel Viacom Inc. v. Gollust, 909 F.2d 724, 731 (2d Cir. 1990) (citing Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986)). An attorney's failure to follow court rules or effectively prosecute his case, or to be aware of the statutes of limitations in the relevant jurisdictions, does not qualify as exceptional circumstances. See

Nemaizer, 793 F.2d at 62. We therefore reject this argument as well.

Accordingly, the judgment of the district court hereby is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of June, two thousand and ten.

UNITED STATES COURT OF APPEALS
FILED
JUN 16 2010
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Xiu Feng Li,

Plaintiff-Appellant,

-v-

09-0844-cv(L),
09-2038-cv (con)

Douglas Hock and SMP, Inc.

Defendants-Appellees.

Xiu Feng Li having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

UNITED STATES
SECOND
CIRCUIT
COURT OF APPEALS